

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS**

UNITED STATES OF AMERICA,

Plaintiff

v.

**THE CITY OF ROCK ISLAND, ILLINOIS
A Municipal Corporation**

and

THE STATE OF ILLINOIS,

Defendants.

No. 4:00-CV-04076-JBM

AGREED MODIFICATION TO CONSENT DECREE

WHEREAS, the parties to this Agreed Modification to Consent Decree (“Agreed Modification”) have agreed, subject to public notice and comment requirements under 28 C.F.R. § 50.7, to extend deadlines for completing implementation of the final elements of certain work required under a Long Term Control Plan (“LTCP”) approved by the United States Environmental Protection Agency (“EPA”) pursuant to the Consent Decree previously approved by the Court in this action, as described in more detail below.

WHEREAS, The United States of America, on behalf of EPA, filed a complaint in this matter on August 18, 2000. The complaint sought injunctive relief and civil penalties for, among other things, unauthorized discharges of pollutants by the City of Rock Island (“Rock Island” or “the City”) from its Main Sewage Treatment Plant and its combined sewer system in violation of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1311, 1319(b). The State of Illinois (“State”) was named as a defendant pursuant to Section 309(e) of the CWA, 33 U.S.C. § 1319(e).

WHEREAS, on August 21, 2003, the Court approved and entered a Consent Decree that resolved the claims asserted by the United States in this action.

WHEREAS, pursuant to Paragraph 7 of the Consent Decree, the City developed and submitted to EPA for approval the LTCP describing projects that the City proposed to implement to insure that combined sewer overflows (“CSOs”) and bypasses identified in the City’s National Pollutant Discharge Elimination System (“NPDES”) permit comply with the requirements of the NPDES permit, the Clean Water Act, and EPA’s April 19, 1994 CSO Policy.

WHEREAS, consistent with Paragraph 11 of the Consent Decree, the LTCP submitted by the City included an implementation schedule that provided for completing construction of projects and fully implementing such projects.

WHEREAS, on April 1, 2008, EPA approved the LTCP submitted by the City, including the schedule of implementation for all projects required under the LTCP. The approved implementation schedule (“LTCP schedule”) is attached as Attachment A to this Agreed Modification to Consent Decree. Upon EPA’s approval of the LTCP, Paragraph 11 of the Consent Decree provided for the City to implement the selected remedies according to the terms and conditions of the LTCP and the schedules under the LTCP.

WHEREAS, the Parties agree that implementation of two of the remedial projects set forth in the approved LTCP – referred to below as “the Outfall 007 Project” and “the Outfall 006 Project” – were delayed as a result of events that qualify as “Force Majeure” events within the meaning of the Consent Decree, and the Parties now seek to modify the Consent Decree to extend the deadlines applicable to those projects in light of delays attributable to the Force Majeure events. Because the modified final deadline for these projects would extend beyond March 31, 2018, approval of the Court is required pursuant to Paragraph 12 of the Consent Decree. A discussion of applicable provisions of the Consent Decree governing modification of approved LTCP schedules and Force Majeure events, and a more detailed description of circumstances that resulted in delays in implementation of the Outfall 007 Project and the Outfall 006 Project, are set forth below.

Applicable Consent Decree Provisions

WHEREAS, Paragraph 12 of the Consent Decree explicitly contemplates that the Parties may agree to extensions of deadlines set forth in approved schedules: “Nothing in this Consent Decree shall limit the rights of the Parties to agree to modifications of the dates initially set forth in the approved schedules of implementation. However, any such modification that extends the deadline for completion of all construction and full implementation beyond March 31, 2018 shall be subject to public notice and comment consistent with 28 CFR Section 50.7, and to approval by the District Court.”

WHEREAS, Paragraph 62 of the Consent Decree provides: “If U.S. EPA finds that a delay in performance is, or was, caused by a Force Majeure event, it shall extend the time for performance, in writing, for a period to compensate for the delay resulting from such event and stipulated penalties shall not be due for such period.”

WHEREAS, Paragraph 60 of the Consent Decree defines “Force Majeure” as “an event arising from causes beyond the control of Rock Island or the control of any entity controlled by Rock Island, including its consultants and contractors, which delays or prevents the performance of any obligation under this Consent Decree.” Paragraph 60 further provides that “if a permitting authority fails to issue, renew or modify – or delays in issuing, renewing or modifying – a lawful permit, order or other action required for any part of the work under this Consent Decree, Rock Island may seek relief under the Force Majeure provisions of this Consent Decree.”

The Outfall 007 Project

WHEREAS, the approved LTCP included a remedial project that provided for relocation of Outfall 007, along with related improvements to the Blackhawk Lift Station, and closure of the original outfall upon commencing operation of the relocated outfall. This project had a 27-month construction schedule with a construction completion deadline of April 14, 2016, and an October 12, 2016 deadline for operational startup of the new outfall and closure of the old

outfall. See Lines 29-33 in Attachment A.

WHEREAS, the Outfall 007 Project in the approved LTCP provides for the elimination of Outfall 007 (a manhole structure) from its current location within Blackhawk State Historic Park along the Rock River; construction of a new Outfall 007, along with screening and disinfection facilities, at a new location further downstream along the Rock River at approximately the intersection of 49th Avenue and 8th Street, Rock Island, Illinois; connection of the new outfall to the existing sewer system; and construction of related improvements for the Blackhawk Lift Station necessary to increase pumping capacity of sewage. In addition, the Outfall 007 Project includes restoration of areas impacted by construction.

WHEREAS, the City submitted an application to the United States Army Corps of Engineers for coverage under Nationwide Permit No. 7 pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344, for certain work required as part of the Outfall 007 Project. The City also provided notice of the Outfall 007 Project to the Illinois Historic Preservation Agency (“IHPA”), due to archaeological interest in Native American historical resources potentially located in soils in the general vicinity of the Outfall 007 relocation site. Additionally, Rock Island initiated efforts to acquire title to the vacant parcel containing the Outfall 007 relocation site.

WHEREAS, after initially issuing a Permit Verification Letter to Rock Island for the Outfall 007 Project on March 31, 2015, the Corps subsequently suspended the City’s coverage under the nationwide permit under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, due to a notification from the IHPA that a Phase I archaeological reconnaissance survey report indicated the presence of an intact, buried land surface of potential archaeological interest within the project area, and that the IHPA was requiring a Phase II archaeological test in the form of backhoe trenching, pursuant to the Illinois State Agency Historic Resources Preservation Act, 20 I.L.C.S. § 3420, as amended, 17 I.A.C. § 4180.

WHEREAS, concurrently with suspending coverage under the nationwide permit for the Outfall 007 Project, the Corps initiated a formal consultation process under the National

Historic Preservation Act (“NHPA”), 54 U.S.C. § 306108, by issuing letters on July 8, 2015, to representatives of the Sac and Fox Nation, the Sac and Fox Nation of Missouri in Kansas and Nebraska, and the Sac and Fox Tribe of the Mississippi in Iowa (collectively, “the Tribes”), with copies to Rock Island, EPA, the Corps, and IHPA. The letters sought information from all consulting parties regarding concerns over the project’s potential effects on historic properties and particularly the Tribes’ concerns with identifying properties that may be of religious and cultural significance to them and may be eligible for the National Register of Historic Places. The Corps informed all consulting parties that the permit would be suspended until such time as the potential impacts to the Outfall 007 relocation site were determined. No time frame for completion of the consultation process was identified in the letters.

WHEREAS, further work on the Outfall 007 project was discontinued, including the process of soliciting contractor bids pending the outcome of the Phase II testing, the NHPA consultation process, and the continuation of the permit application review by the Corps.

WHEREAS, on July 17, 2015, Rock Island formally informed EPA in writing of the indefinite delay in the Outfall 007 project (including the Blackhawk Lift Station improvements) caused by the archaeological review of the relocation site and suspension of the permit by the Corps, and notified EPA that the permit suspension, the archaeological review and the Corps’ consultation process with the Tribes were Force Majeure events likely to prevent construction completion by April 14, 2016, as well as operational start-up of new Outfall 007 and closure of the old outfall by October 12, 2016.

WHEREAS, Rock Island thereafter continued its efforts to acquire title to the Outfall 007 relocation site property through negotiations with the parcel owner. These efforts included obtaining consent for entry to the property to conduct the Phase II archaeological testing.

WHEREAS, on April 1, 2016, Rock Island acquired title to and easements upon the relevant portions of the parcel containing the relocation site for Outfall 007. On April 5 and April 6, 2016, the Phase II archaeological test was conducted using backhoe trenching within the project area. On April 25, 2016, the Phase II Archaeological Testing report was issued,

concluding that the testing revealed no significant cultural material or archaeological features, that the relocation site was not eligible for listing on the National Register of Historic Places, that no further archaeological work was recommended, and that project clearance was recommended. The report was shared with the Tribes, the Corps, IHPA, and EPA.

WHEREAS, on June 21, 2016, IHPA approved the Outfall 007 project. On September 20, 2016, the City received approval from the Corps for coverage under the nationwide permit, thereby allowing the proposed construction of the new Outfall 007 to proceed on the Rock River.

WHEREAS, Rock Island resumed work on the Outfall 007 Project and subsequently solicited public bids for the construction work for the Outfall 007 on March 28, 2017. Rock Island requested all bidders to adhere to a nine-month construction schedule for the Outfall 007 Project, with a completion date prior to the final Consent Decree deadline of March 31, 2018. On April 3, 2017, Rock Island informed EPA of the anticipated contract schedule and that such schedule could be subject to weather, equipment delivery, or other types of unforeseen delays.

WHEREAS, the construction contract awarded by the City for the Outfall 007 Project included a project completion date of March 15, 2018. Construction of the Outfall 007 project began on July 27, 2017.

WHEREAS, on January 30, 2018, Rock Island notified EPA in writing that winter weather conditions had resulted in construction delays on the Outfall 007 Project, and that the work necessary to render the new Outfall 007 operational was anticipated to extend past the March 15, 2018, contractual deadline.

WHEREAS, the Parties agree that the archaeological review of the Outfall 007 project, the Corps' consultation with the Tribes as required by Section 106 of the NHPA, 54 U.S.C. § 306108, the resultant delays in the Corps' permit approval, and the extreme weather conditions in the 2017-2018 winter season, that caused or are causing delays in achieving full operation of the Outfall 007 project, are Force Majeure events, and that a written extension of time to compensate for the delays resulting from the Force Majeure events is necessary.

WHEREAS, the following tasks remain to be completed on the Outfall 007 Project:

Relocation of Outfall 007 and Installation of Screening and Disinfection Facilities

- installation of approximately 225 lineal feet of 48-inch sewer and approximately 60 lineal feet of 30-inch sewer;
- tunneling for a 48-inch sewer railroad crossing;
- installation of four manholes on the 48-inch sewer;
- installation of a cast-in-place screen structure;
- installation of disinfection and de-chlorination feed equipment and mechanical piping;
- installation of electrical controls and wiring for the disinfection and de-chlorination systems, pumps, general lighting, and any other item requiring power and monitoring controls;
- site restoration work, including paving and fencing, relating to the Outfall 007 relocation site;

Blackhawk Lift Station Improvements

- installation of a surge tank, submersible pumps, pump check and isolation valves, a new electrical service transformer by the electrical utility, HVAC equipment, and electric controls and wiring; and
- site restoration work, including paving, curb and gutter work, relating to the Blackhawk Lift Station

WHEREAS, the Parties agree that a June 30, 2018 deadline for completing all work on the Outfall 007 Project, other than the site restoration work at the Outfall 007 relocation site and the Blackhawk Lift Station, appropriately compensates for delays attributable to Force Majeure events, that delayed implementation of the Outfall 007 Project. The Parties further agree that an August 31, 2018 deadline for completing all required site restoration work at the Outfall 007 relocation site and the Blackhawk Lift Station appropriately compensates for delays attributable

to Force Majeure events, including anticipated seasonal conditions commonly encountered in the area where the site restoration activities will be performed.

The Outfall 006 Project

WHEREAS, the Outfall 006 Project in the approved LTCP provided for the construction of certain storm sewers, the partial separation of combined sewers tributary to Outfall 006, and the elimination of Outfall 006.

WHEREAS, Rock Island completed major elements of the Outfall 006 Project, including sewer construction and separation activities, commencement of operation of the sewer improvements, and permanently closing Outfall 006, prior to the January 5, 2018 project completion deadline for that project under the LTCP schedule. See Line 38 in Attachment A. However, the restoration of landscape surfaces and surface soils disturbed by the separation and construction work was delayed, and continues to be delayed, due to winter weather conditions that prevented the start or completion of restoration tasks. The restoration work area is located along a Mississippi River channel known as the Sylvan Slough, which is susceptible to persistent soil saturation conditions.

WHEREAS, the Parties agree that the winter weather conditions that caused and are causing delays in the full completion of the remaining elements of the Outfall 006 Project are Force Majeure events, and that an extension of time to compensate for the delays resulting from the Force Majeure events is necessary.

WHEREAS, the landscaping and surface restoration tasks necessary to fully complete the Outfall 006 Project include:

- temporary pavement removal;
- final pavement installation for roadways, sidewalks, and driveway approaches;
- pavement marking and signage;
- soil grading and topsoil placement;

- landscaping (i.e., seeding and sodding); and
- final cleanup.

Seeding and sodding in particular require warm weather conditions, and would require a schedule well into the summer months in order to assure successful re-vegetation. These tasks are ancillary to the primary sewer work and will not interfere with or impede the functioning of the improved and now-operational sewer system in that area.

WHEREAS, the Parties agree that an August 31, 2018 deadline for completing the remaining work on the Outfall 006 Project appropriately compensates for delays attributable to Force Majeure events, including anticipated seasonal conditions commonly encountered in the area where the remaining activities will be performed.

WHEREAS, the agreed modification to the schedule extends beyond March 31, 2018, and is subject to public notice and comment consistent with 28 C.F.R. § 50.7 and to approval by this Court.

WHEREAS, the Parties have now agreed to the following modifications to the LTCP schedule and Consent Decree, as set forth herein. The proposed modifications are to:

(1) extend the completion date for the primary work for the Outfall 007 project to June 30, 2018, and (2) extend the completion date for the ancillary (i.e., surface, surface soil, and landscape restoration) work for the Outfall 007 project, as well as the completion date for the ancillary surface, surface soil, and landscape restoration work for the Outfall 006 project, to August 31, 2018.

WHEREAS, upon approval by the Court, the Agreed Modification shall be an enforceable term of the Consent Decree.

WHEREAS, the Parties recognize, and the Court by entering this Agreed Modification finds, that this Agreed Modification has been negotiated at arms-length and in good faith, and that this Agreed Modification is fair, reasonable, and in the public interest.

NOW THEREFORE, before the taking of any further testimony, without further adjudication of any issue of fact or law, and upon the consent and agreement of the Parties, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. The Consent Decree shall remain in full force and effect in accordance with its terms, except as provided in Paragraphs 2, 3, and 4 below.
2. Except as provided in Paragraph 3, the City shall complete all remaining work on the Outfall 007 Project by June 30, 2018. As to the relocation of Outfall 007, the City shall complete: installation of approximately 225 lineal feet of 48-inch sewer and approximately 60 lineal feet of 30-inch sewer; tunneling for the 48-inch sewer railroad crossing; installation of four manholes on the 48-inch sewer; installation of a cast-in-place screen structure; installation of disinfection and de-chlorination feed equipment and mechanical piping; and installation of electrical and controls wiring. As to the Blackhawk Lift Station improvements, the City shall complete the installation of a surge tank, submersible pumps, pump check and isolation valves, a new electrical service transformer by the electrical utility, HVAC equipment, and electric controls and wiring. The relocated Outfall 007, screening and disinfection facilities, and the improvements to the Blackhawk Lift Station shall be fully operational, and the original Outfall 007 shall be closed, by June 30, 2018.
3. The City shall complete the following tasks by August 31, 2018: paving, fencing, and site restoration for the relocation of Outfall 007; and paving, curb, and gutter work, and site restoration for the improvements to the Blackhawk Lift Station.
4. The City shall complete all remaining work on the Outfall 006 Project by August 31, 2018, including the following landscaping and surface restoration tasks: temporary pavement removal; final pavement installation for roadways, sidewalks, and driveway approaches; pavement marking and signage; soil grading and topsoil placement; landscaping (i.e., seeding and sodding); and final cleanup.
5. The Parties agree and acknowledge, and this Court finds, that this Agreed

Modification of the Consent Decree is subject to the requirements of 28 C.F.R. § 50.7, which provides for notice and an opportunity for submission of public comment. The United States reserves the right to withdraw or withhold its consent to this Agreed Modification of Consent Decree if the public comments regarding the Agreed Modification of Consent Decree disclose facts or considerations indicating that the Agreed Modification of Consent Decree is inappropriate, improper, or inadequate. Rock Island and the State of Illinois consent to entry of this Agreed Modification of Consent Decree without further notice and agree not to withdraw from or oppose entry of this Agreed Modification of Consent Decree by the Court or to challenge any provision of the Agreed Modification of Consent Decree, unless the United States has notified Rock Island and the State of Illinois in writing that it no longer supports entry of the Agreed Modification of Consent Decree.

JUDGMENT IS HEREBY ENTERED in accordance with this Amendment to Consent Decree, on this 7th day of December, 2018

/s Joe B. McDade
HON. JOE B. McDADE
UNITED STATES DISTRICT COURT JUDGE

THE UNDERSIGNED PARTY hereby consents to this Agreed Modification of Consent Decree in *United States v. City of Rock Island, et al.*, No. 4:00-CV-04076 (C.D. Illinois).

FOR THE UNITED STATES OF AMERICA:

Date:

October 29, 2018

s/Bruce S. Gelber

BRUCE S. GELBER
Deputy Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

Date:

10/30/2018

s/Randall M. Stone

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FOR THE UNITED STATES OF AMERICA:

JOHN E. CHILDRESS
United States Attorney
for the Central District of Illinois

Date: 4/23/18

s/Joshua I. Grant

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FOR THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY:

Date: 4/23/18

s/Mark Pollins

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s/Sarah Gonzalez

Date: 4/12/2018

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FOR THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY:

Date: 4/15/2018

s/T. Leverett Nelson

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Date: April 17, 2018

s/Kevin Chow

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FOR THE STATE OF ILLINOIS:

LISA MADIGAN
Illinois Attorney General

Date:

4/23/18

s/Elizabeth Wallace

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FOR THE CITY OF ROCK ISLAND:

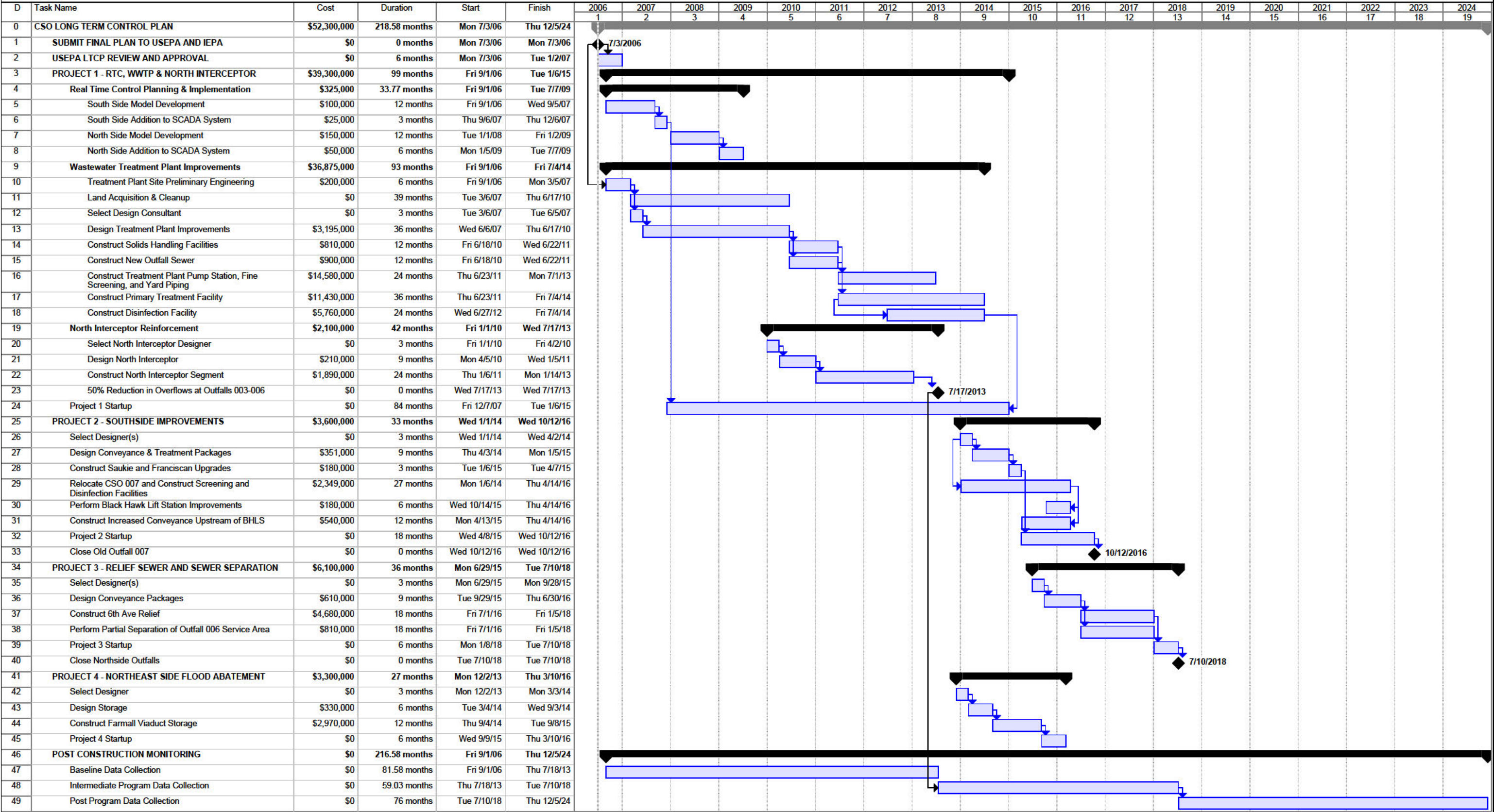
Date: April 5, 2018

s/Roy M. Harsch

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ATTACHMENT A

Table 8.2
Implementation Schedule
Rock Island Combined Sewer Overflow Long Term Control Plan



Project: Rock Island CSO LTCP
Date: June 30, 2006

Task

Progress

Milestone

Summary

Project Summary

External Tasks

Deadline

External Milestone